



County of San Bernardino
Office of the District Attorney
JASON ANDERSON, District Attorney
Appellate Services Unit

September 6, 2019

Via E-Mail and U.S. Mail

Mr. Christopher Damien
The Desert Sun
750 N. Gene Autry Trail
Palm Springs, CA 92264
christopher.damien@desertsun.com

Re: Your California Public Records Act Request
Death of Allen Kephart

Mr. Damien:

The San Bernardino County District Attorney's Office has received your California Public Records Act (CPRA) request, dated August 28, 2019. The request was received on September 4, 2019.

You have requested:

All records related to the report, investigation and/or findings regarding the death of Allen Kephart during a critical incident with San Bernardino County Sheriff's Department and whether the DA's Office determined to file charges or not against the sheriff's department's staff involved.

News Release and Legal Analysis Memorandum

In 2012, the District Attorney published a news release announcing the decision not to file criminal charges in relation to that incident. At that time, an in-depth, 50-page analysis of the case was also publicly released. Copies of both documents are attached to the e-mail version of this letter.

As these records were previously released in electronic form, there is no charge for them in that state. If you wish to have hard copies, the cost is 18.5 cents per page.

Further Records

The District Attorney declines to release further records in relation to this incident. Law enforcement records are generally exempt from disclosure under the CPRA. (Gov. Code, § 6254, subd. (f).) The exemption continues after the investigation has ended. (*Williams v. Superior Court* (1993) 5 Cal.4th 337, 357.)

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Separately, law enforcement records can contain sensitive personal information¹ which should usually not be publicly released. (Cal. Const., art. I, § 1 [right to privacy]; Gov. Code, § 6255, subd. (a) [general exemption].) More generally, the privileges of the Evidence Code are applicable to CPRA requests. (Gov. Code, § 6254, subd. (k)). Law enforcement investigations are confidential by their nature. (Evid. Code, § 1040; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 764.)

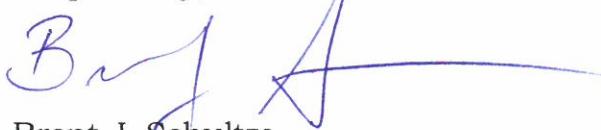
The District Attorney's internal documents related to this case are privileged attorney work-product, and not subject to disclosure. (Gov. Code, § 6254, subd. (k); Code Civ. Proc., § 2018.030; see also *State Comp. Ins. Fund v. Superior Court* (2001) 91 Cal.App.4th 1080, 1091; *People v. Superior Court (Jones)* (2019) 34 Cal.App.5th 75, 80–81.) Additionally, such records are exempt as deliberative process. (*Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.)

Audio and Visual Recordings of a Critical Incident

Based on recent changes to the CPRA (effective July 1, 2019), you may be entitled to receive audio and/or visual recordings related to this incident. (Gov. Code, § 6254, subd. (f)(4).) Should you request such audio and/or visual recordings, their production would not be immediate. We would need to determine whether we still possess such recordings, then determine whether the recording should be redacted or withheld to protect any reasonable expectation of privacy. (Gov. Code, § 6254, subd. (f)(4)(B)(i).) If you are requesting audio and/or visual recordings, please follow up and specify that.

If you have any further questions about this request, feel free to e-mail me at bschultze@sbcda.org.

Respectfully,



Brent J. Schultze
Deputy District Attorney

Attachments (e-mail only):

- News Release, January 23, 2012
- Interoffice Memorandum, January 20, 2012

¹ For example, witness names, addresses, telephone numbers, social security numbers, et cetera. (See also Civ. Code, § 1798.3, subd. (b).)



Office of the

DISTRICT ATTORNEY

Michael A. Ramos, San Bernardino County District Attorney

NEWS RELEASE

For Immediate Release

Contact: William Lee

Deputy District Attorney
(909) 387-0155

Date: January 23, 2012

DISTRICT ATTORNEY DECLINES TO FILE CHARGES IN FATAL OFFICER-INVOLVED DEATH IN CREST PARK

SAN BERNARDINO, Calif. – The San Bernardino County District Attorney's Office has completed its review of the officer-involved death of Allen John Kephart, 44, of Crest Park by San Bernardino County Sheriff's Deputies Ismael Diaz, Michael Gardea and Jerred Besheer, and Sgt. Bryan Lane on May 10, 2011.

The San Bernardino County District Attorney's Office concludes that there is insufficient evidence to establish criminal liability on the part of any involved member of the Sheriff's Department and declines to file criminal charges.

The report of the written case evaluation is attached or is available by contacting Christopher Lee at the District Attorney's Office at (909) 382-3665.

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INTEROFFICE MEMORANDUM

DATE: January 20, 2012 PHONE: (909) 387-0155
 FAX: (909) 387-6438



FROM: **WILLIAM LEE**
Deputy District Attorney
Central Division

TO: **DENNIS CHRISTY**
Assistant District Attorney

CLARK HANSEN III
Chief Deputy District Attorney
Central Division

SUBJECT: **OFFICER INVOLVED DEATH**

Involved Deputies: Sgt. Bryan Lane, Dep. Ismael Diaz, Dep. Michael Gardea &
Dep. Jerred Besheer
Deceased Subject: Allen John Kephart (dob 06-27-1967)
Resident of Crest Park, CA 92352
Date/Time of Incident: May 10, 2011; approx. 1515 hours
Investigating Agency: San Bernardino County Sheriff Dept.
Case Agent: Sergeant Neal Rodriguez
DR No: 051101146
DA STAR No.: 2011-00-0041204

PREAMBLE

The summary of this incident is drawn from material submitted by the San Bernardino County Sheriff Department. The case agent is Sergeant Neal Rodriguez. The submission contains various narrative reports that include interviews of deputies and civilians, dispatch call log, crime scene description and diagram, photographs, video recordings, audio recordings, coroner investigation report, autopsy protocol with attached toxicology reports, and the deceased subject's criminal history.

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1. Transcript of Audio Recording of Traffic Stop

PREFATORY STATEMENT

Allen John Kephart ("KEPHART") died following an encounter with deputies from the San Bernardino County Sheriff Department. KEPHART was a resident of the San Bernardino County mountain community of Crest Park. The area is under the jurisdiction of the Sheriff Department. Deputies Ismael Diaz ("DIAZ"), Michael Gardea ("GARDEA") and Jerred Besheer ("BESHEER") were assigned to the local Twin Peaks office. Sergeant Bryan Lane ("LANE") was the assigned watch commander.

On May 10, 2011, DIAZ initiated a traffic stop on KEPHART. KEPHART eventually stopped at a Valero gas station. KEPHART appeared non-compliant. A struggle ensued between KEPHART and DIAZ, which was later joined by LANE, and then by GARDEA and BESHEER. Once handcuffed, KEPHART became unresponsive. Life-saving measures were undertaken by the deputies and then by medical personnel, to no avail. KEPHART died shortly thereafter.

The District Attorney's Office is tasked with evaluating the actions of all parties to determine whether criminal charges should be filed against any member of the Sheriff Department. The burden of proof in criminal cases is proof beyond a reasonable doubt.

SUMMARY OF EVIDENCE

INTERVIEW WITH DEPUTY ISMAEL DIAZ

DIAZ was on patrol on May 10, 2011. He was in uniform and driving a marked patrol car. At approximately 1515 hours, DIAZ was at a stop sign in the northbound direction of Daley Canyon Road.¹ He signaled a left turn. A white truck from the opposing direction entered the intersection. DIAZ was next in-line to enter. A small, black Honda CR-V SUV (5PMM017) – driven by KEPHART – followed the white truck without stopping and almost hit DIAZ. DIAZ honked his horn. KEPHART turned, looked at DIAZ, but continued driving.

DIAZ turned on his lights and sirens to initiate a traffic stop. KEPHART failed to yield for approximately 0.9 miles before he finally pulled over at a Valero gas station on Highway 18. During this pursuit, two cars in front of KEPHART pulled into a turnout on Daley Canyon Road while KEPHART continued driving. KEPHART also raised his hands in the air. He came to a stop sign at Daley Canyon Road and Highway 18, turned right, and continued driving. KEPHART also drove past a turnout on Highway 18.

¹ This is the intersection of Daley Canyon Road and Highway 189. The former travels north/south and the latter travels east/west. The eastbound direction of Highway 189 terminates at Daley Canyon Road. There is a stop sign in all directions.

While on Highway 18, DIAZ informed dispatch that they were travelling at 40 mph. The posted speed limit is 45 mph. DIAZ felt that KEPHART was refusing to pull over and informed dispatch that KEPHART was failing to yield. Eventually, KEPHART pulled into a Valero gas station. DIAZ notified dispatch and parked behind KEPHART to conduct a felony traffic stop.²

The total pursuit covered approximately 0.9 miles. They travelled 0.5 miles on Daley Canyon Road and 0.4 miles on Highway 18.

DIAZ exited his patrol car with his gun drawn and yelled out commands. KEPHART yelled back. His words were inaudible except the word "carwash."³ DIAZ ordered KEPHART to place his hands outside the window. KEPHART complied. DIAZ ordered KEPHART to use one hand to open his door. KEPHART pulled both hands into the car. DIAZ ordered KEPHART to return both hands out the window and to open the door. KEPHART complied. DIAZ ordered KEPHART to exit the car and to turn away from DIAZ. KEPHART exited but turned towards DIAZ.

DIAZ took notice of KEPHART'S size. DIAZ is 6 feet tall and 185 pounds. (The autopsy protocol lists KEPHART'S weight as 392 pounds. Various sources describe his height as 5'9, 5'11 and 6'3.)⁴ KEPHART appeared frantic and disoriented. Rather than strictly complying with orders, KEPHART talked back.

DIAZ ordered KEPHART to face away from DIAZ. KEPHART stepped towards DIAZ. DIAZ ordered him to stop and turn around. KEPHART stopped but turned 360 degrees, again facing DIAZ. DIAZ felt there was something unusual about KEPHART and his behavior. DIAZ told him to stop and face away. KEPHART complied. DIAZ ordered him to place his hands behind his back. KEPHART turned and faced DIAZ.

DIAZ ordered KEPHART to turn away and to get onto his knees. KEPHART appeared to comply but then turned and faced DIAZ again. KEPHART uttered words that DIAZ could not understand. DIAZ asked, "what's wrong with you?" DIAZ decided to let

² A "felony traffic stop" is initiated when the deputy perceives an increase in risk to himself, the subject, or others. The purpose is to minimize perceived risk while the deputy discharges his or her duties.

³ There was a car wash at Valero.

⁴ KEPHART'S DMV record shows 5 feet, 9 inches. His CLETS printout shows 5 feet, 11 inches. The autopsy protocol lists his "length" at 75 inches (i.e., 6 feet, 3 inches).

The autopsy measurement is the least accurate measure of height. First, it is an estimate of "length" while lying down rather than "height" while standing. Second, KEPHART'S standing height may compress due to his 392 pound frame. Third, the measuring tape is placed over the body and, therefore, includes natural curvatures, such as stomach, etc.

KEPHART stand in case he had a medical condition. That precaution was based on KEPHART'S size and the appearance of swollen calves.

Before DIAZ ordered KEPHART to stand up, he stood up and turned to face DIAZ again. DIAZ again ordered KEPHART to face away. KEPHART complied. DIAZ ordered KEPHART to place his hands behind his back. KEPHART complied.

DIAZ put away his firearm, approached KEPHART, and tried to bring his arms together. The handcuffs would not fit around his wrists. Bystanders continued to gather. DIAZ felt he needed to quickly gain control of the situation and of KEPHART.

KEPHART tried to turn and face DIAZ again. DIAZ discarded his handcuffs and applied a control hold – without success. DIAZ could not use an “arm bar” due to KEPHART'S size. DIAZ reached around KEPHART'S neck and pulled him to the ground. KEPHART fell to the ground and DIAZ fell onto KEPHART'S back. DIAZ tried to pin KEPHART to the ground while issuing commands for him to stay down. DIAZ radioed dispatch that he was “415”⁵ with KEPHART.

DIAZ heard a bystander referring to KEPHART as “Allen” and telling him to stop resisting. Another bystander approached to assist DIAZ. DIAZ ordered him away. DIAZ did not know if KEPHART had any weapons. Coupled with KEPHART'S non-compliant behavior, DIAZ was concerned for his and others' safety.

DIAZ decided to use his taser. He stood up, drew his taser and turned it on. The taser screen showed two dashes. He pulled the trigger but it did not fire. He turned it off-and-on but it did not operate. DIAZ re-holstered the taser and reengaged KEPHART.

DIAZ continued ordering KEPHART to stop resisting and to put his hands behind his back. KEPHART resisted and tried to get up off the ground. DIAZ decided to use his taser again. This time, DIAZ used the “staple” and “drive stun” technique. (This technique is discussed in a later section.) One dart made contact with KEPHART but DIAZ could not see the second dart. DIAZ then drive stunned KEPHART. DIAZ heard the taser cycle but – due to it being inoperable or ineffective – KEPHART continued to resist. DIAZ discarded the taser feeling it was useless. DIAZ was particularly concerned with controlling KEPHART'S right hand because it appeared to reach towards DIAZ'S waist area. DIAZ found it difficult to control KEPHART.

LANE soon arrived. LANE tried to control KEPHART'S left arm. LANE used his taser, which was ineffective in gaining compliance. They attempted to pull KEPHART'S hands behind his back to handcuff him. KEPHART'S size prevented the use of

⁵ In reference to Penal Code section 415, which prohibits unlawful fighting, making unreasonably loud noise, etc.

traditional handcuffs. GARDEA and BESHEER later arrived. BESHEER used "flex cuffs" to successfully restrain KEPHART'S hands behind his back.

Shortly thereafter, LANE told a deputy to call for medical aid. KEPHART was rolled over and checked for a pulse. None was found. The flex cuffs were cut, KEPHART was rolled onto his back, and CPR was administered until the fire department arrived.

DIAZ opined that KEPHART did not take the traffic stop seriously. This and not any medical condition explained KEPHART'S non-compliant behavior during the first moments at Valero. KEPHART failed to comply with orders unless and until they were very specific. And there was no compliance whatsoever after they went to the ground.

DIAZ'S arms were cramping and seizing up while struggling with KEPHART. During the struggle, DIAZ did not use any weapon or force other than those described—i.e., no closed fists, elbows, knees, feet, baton, etc. DIAZ felt those measures would be ineffective due to KEPHART'S size.

DIAZ had an audio recorder in his chest pocket. He recorded the entire traffic stop.

INTERVIEW WITH SERGEANT BRYAN LANE

LANE was the watch commander assigned to the Twin Peaks station. LANE is 5 feet, 9 inches tall and weighs 170 pounds. He was wearing a uniform.

On May 10, 2011 at approximately 1500 hours, LANE was at the Twin Peaks station when he heard DIAZ broadcast the traffic stop and the failure to yield. LANE went to assist in a marked vehicle. LANE heard DIAZ broadcast the stop at Valero and the "415." LANE drove "code 3" (i.e., lights and sirens) to Valero.

A civilian waived LANE into the Valero parking lot. LANE'S first observation was of DIAZ and KEPHART struggling on the ground. DIAZ was trying to pull KEPHART'S hands behind his back. He saw a taser cartridge on the ground with exposed wires.

KEPHART was on his left side "posting" himself with his left hand. DIAZ ordered him to stop resisting, to give up his hands, and to get on his stomach. KEPHART was non-compliant and trying to get up off the ground. LANE tried to prevent KEPHART from "posting" with his left hand. LANE again ordered KEPHART to stop resisting, to give up his hands and to get on his stomach. KEPHART was talking but LANE could not make out the words. LANE was unable to control KEPHART'S left hand.

LANE warned KEPHART that he would use his taser. KEPHART still did not comply. LANE pulled out his taser, pulled off the cartridge, and "drive stunned" KEPHART in

the left abdomen and upper left back area. It appeared to have no effect. KEPHART was grunting and yelling for help but still did not comply.

Unsure if the taser was inoperable or ineffective due to poor body placement, LANE drive stunned KEPHART elsewhere. LANE held KEPHART'S arm and felt a charge through KEPHART'S body. DIAZ was also using his taser. KEPHART was screaming and making grunting noises. LANE and DIAZ continued ordering KEPHART to give up his hands and to stay on the ground. KEPHART remained non-compliant.

The struggle continued for several minutes. LANE believes he activated his taser eight times. Nothing worked in gaining control of KEPHART. LANE threw the taser aside. Eventually, LANE positioned KEPHART'S hands to allow for handcuffing. The handcuffs would not fit around KEPHART'S wrists. Neither he nor DIAZ had flex cuffs. LANE hoped to maintain control of KEPHART until additional deputies arrived.

LANE noticed that KEPHART had scraped his face against the pavement and was bleeding. LANE was concerned that KEPHART'S size and position might cause asphyxia. LANE hoped to quickly gain control and to get him off his stomach.

Other deputies arrived with flex cuffs. As they applied the flex cuffs, KEPHART was taking deep, long breaths that appeared labored. KEPHART stopped moving. LANE instructed other deputies to check KEPHART. He was moved onto his right side. BESHEER, who had medical experience, could not find a pulse. The flex cuffs were cut and CPR was administered until medical personnel arrived.

LANE estimated that it was one minute between the application of the flex cuffs and the administration of life-saving measures. LANE estimated that the struggle with KEPHART lasted five minutes.

Other than the actions described above, LANE did not use any other type of force—i.e., hands, feet, fist, baton, firearms, etc.

INTERVIEW WITH DEPUTY MICHAEL GARDEA

GARDEA is 5 feet, 4 inches tall and weighs 165 pounds. He is assigned to the Twin Peaks station. He was wearing his uniform and was in a marked vehicle. On May 10, 2011 at approximately 1500 hours, he and BESHEER were at the Blue Jay Mall. They heard DIAZ'S 415 call and drove code 3 to Valero.

GARDEA'S first observations were: (1) KEPHART in the prone position with DIAZ and LANE on top of him. (2) KEPHART in a push-up position with his hands on the ground. GARDEA, a former wrestler, felt KEPHART was attempting to push himself

up to get his feet under him. (3) KEPHART being ordered to stop resisting and to put his hands behind his back.

GARDEA grabbed KEPHART'S left wrist. Controlling him was difficult due to his strength and large wrists. KEPHART'S legs were kicking. BESHEER struck his leg twice with his hands to prevent the kicking. KEPHART was speaking but GARDEA could not make out the words. KEPHART was bleeding near his nose and eye.

GARDEA saw a taser cartridge on the ground. He decided to use his taser. He removed the cartridge and drove stunned KEPHART. LANE told him that tasers were ineffective. GARDEA put the taser away after one application.

GARDEA was asked to get flex cuffs. GARDEA took the flex cuffs to BESHEER and assisted in restraining KEPHART. As the flex cuffs were being applied, KEPHART stopped resisting. Approximately 4 or 5 flex cuffs were used to restrain KEPHART.

LANE noticed that KEPHART stopped resisting. He asked if KEPHART was breathing. When checked for a pulse, KEPHART was unresponsive. They began administering CPR. GARDEA personally administered two rounds of chest compressions.

Other than the force described above, GARDEA did not hit or strike KEPHART. The only striking GARDEA saw were the strikes to KEPHART'S legs by BESHEER.

GARDEA estimates the struggle with KEPHART lasted 2 to 5 minutes. It was approximately one minute between the handcuffing and the request for medical aid. They administered CPR for 5 to 10 minutes before medical personnel arrived.

INTERVIEW WITH DEPUTY JERRED BESHEER

BESHEER is 5 feet, 11 inches tall and weighs 160 pounds. He is assigned to the Twin Peaks station. On May 10, 2011, at approximately 1500 hours, he and GARDEA were at the Blue Jay Mall. Upon learning of DIAZ'S call, BESHEER drove code 3 to the Valero gas station.

BESHEER saw DIAZ, LANE and two civilians attempting to restrain KEPHART. BESHEER told the civilians to release their hold and to move away. KEPHART was fighting and kicking his legs trying – in BESHEER'S opinion – to free himself.

BESHEER tried to bend KEPHART'S legs at the knees and ordered him to stop kicking. KEPHART did not comply. BESHEER struck KEPHART'S calf one time with a closed fist. KEPHART became more compliant insofar as the kicking of his legs. LANE tried to handcuff KEPHART'S right arm but could not.

BESHEER tried to gain control of KEPHART'S left arm. BESHEER pulled it out but KEPHART pulled it back under himself. BESHEER next tried a lateral head displacement technique by placing his right arm against KEPHART'S head and applying pressure in order to move his head and body upwards. This was ineffective. Next BESHEER applied pressure to pressure points near KEPHART'S left ear. This was ineffective. Next BESHEER asked someone to tase KEPHART. Someone drove stunned KEPHART with a taser on his back between his shoulder blades. This allowed BESHEER to pull KEPHART'S left hand behind his back. BESHEER placed his knee at KEPHART'S chest to prevent him from pulling his arm back underneath himself.

BESHEER told GARDEA to get flex cuffs. They were able to place a flex cuff on each wrist and used 2 or 3 more flex cuffs to connect the wrists. KEPHART stopped resisting while the flex cuffs were being applied.

KEPHART appeared to turn blue. He was rolled onto his right side and checked for a pulse. None was found. The flex cuffs were cut, KEPHART was rolled onto his back, and BESHEER used a stethoscope to check for a pulse and sounds of breathing. None were found. CPR was administered until the fire department arrived.

During the struggle, KEPHART made grunting noises. KEPHART was continually ordered to stop resisting. While applying the lateral head displacement technique, BESHEER believes he ordered KEPHART to give up his hands. No one—other than himself—punched, kicked or hit KEPHART. BESHEER saw one taser application. No one used any other weapons.

INTERVIEW WITH OFFICER EDDIE ESCALERA

Officer Eddie Escalera is a CHP officer assigned to the Arrowhead Station. In the spring of 2011, he received a call of a DUI driver. He saw the car—driven by KEPHART—and began to follow it. The car crossed over lines on either side of the lane and KEPHART jerked back both times. A traffic stop was initiated by activating the lights and sirens on the patrol car.

Officer Eddie Escalera nearly advised dispatch that he was in a pursuit when KEPHART finally pulled over after driving nearly $\frac{3}{4}$ to 1 mile. Officer Eddie Escalera advised KEPHART of the reason for the stop. KEPHART'S response was "what?" and "I'm not doing anything wrong." It was determined that KEPHART was not under the influence of any substance and he was released. Officer Eddie Escalera described KEPHART as "agitated and slow."

INTERVIEWS WITH OTHER LAW ENFORCEMENT OFFICERS

Several other law enforcement personnel were interviewed. Their presence at the scene was short. Their statements are briefly summarized below.

CHP Officer Alton Gunnoe was on duty and heard that a deputy was engaged with a suspect. He followed two Sheriff units to the Valero gas station. His first observations were: (1) Three or four deputies holding onto KEPHART, (2) KEPHART face-down on the ground, (3) LANE placing the second flex cuff onto KEPHART'S arm, and (4) KEPHART not resisting. The deputies rolled KEPHART onto his side and checked for a pulse. He was unresponsive. The flex cuffs were cut, KEPHART was rolled onto his back, and CPR was begun. The fire department arrived 2 to 3 minutes later.

Deputy Tracy Klinkhart was working in Crestline when he learned of DIAZ'S failure-to-yield call. His first observations upon arriving at Valero were: (1) KEPHART face-down on the ground, (2) all fighting or struggling having ended, (3) LANE telling BESHEER and DIAZ to roll KEPHART over, and (4) KEPHART appearing not to be breathing. BESHEER could not find a pulse. CPR was begun. Klinkhart requested that medical aid be expedited. CPR continued until the fire department arrived.

Deputies Mark Rios and Joseph Cottrell were assigned to the Big Bear Sheriff Station. They were together in a patrol car when they heard DIAZ'S call. They arrived after KEPHART had been flex cuffed. They did not witness the struggle between KEPHART and the deputies. Their statements regarding the life-saving measures that were administered were consistent with the statements of others.

Deputies Gary Dominguez and Nate Newsome were assigned to the Twin Peaks Station and working patrol together. They arrived about the time the flex cuffs were being removed from KEPHART. They did not witness the struggle between KEPHART and the deputies. Their statements regarding the life-saving measures that were administered were consistent with the statements of others.

INTERVIEW WITH WITNESS 1

Witness 1 was at Valero and saw KEPHART and the deputy pull into the parking lot. Both exited their cars. KEPHART'S hands were in the air. He turned around a couple of times—perhaps twice—and kept saying, "I ain't got nothing" as he turned. The deputy's voice grew louder but Witness 1 could not make out what was said. Witness 1 was standing some distance away and was next to the car wash machine. It appeared that KEPHART was treating the matter like a joke.

The deputy's voice grew louder and appeared that he was giving commands. KEPHART did not comply. Instead, he moved closer to the deputy. KEPHART turned

around again and moved toward the deputy. By now the deputy had pulled out his firearm and kept yelling at KEPHART.

KEPHART moved sideways, causing the deputy to move also. Witness 1 saw KEPHART stand still; and then he saw taser wires attached to KEPHART. The taser did not appear to have any effect. The deputy appeared to directly apply the taser to KEPHART'S neck. KEPHART reacted to this.

At some point, KEPHART went to the ground and Witness 1's vision was obscured by the patrol car. KEPHART was pinned to the ground with the taser. KEPHART sounded frantic as he yelled, "Get off me, get off me." His hands were underneath his stomach. This continued for a minute or two until another deputy arrived. KEPHART was strong and kept both hands under himself. A bystander tried to help the deputies.

More deputies arrived. There were more taser applications. The deputies pulled one hand out but KEPHART pulled it back underneath himself. The deputies were having difficulty handcuffing him. Witness 1 went inside the store to get his girlfriend. When he returned, several deputies were engaged with KEPHART. KEPHART was still on his stomach but it was not clear if he was still resisting. In looking at KEPHART'S toes, it appeared that he was trying to push himself off the ground. KEPHART'S body suddenly went limp. The deputies rolled him over and began CPR.

INTERVIEW WITH WITNESS 2

Witness 2 was inside Valero with her boyfriend, Witness 1. She came outside and saw KEPHART outside his car with his hands up. The deputy had his gun drawn. KEPHART turned around three times with his hands up. Witness 2's attention was split between watching the incident, looking around, and talking to others.

She next noticed that KEPHART was on the ground and the deputy was trying to detain him. KEPHART appeared to be struggling, resisting arrest and pulling his hands away. He was not, however, violent. He was either standing or on his knees when first tased in the back of the neck. She heard the noise from the taser.

Another deputy arrived. They were on top of KEPHART. KEPHART was "flopping" around while being tased. Witness 2's view was obstructed by a patrol car but she saw KEPHART'S feet. Eventually, KEPHART stopped moving and the deputies began CPR.

INTERVIEW WITH WITNESS 3

Witness 3 was at Valero with his wife Witness 4. He heard sirens and saw KEPHART and the deputy drive into Valero. The deputy exited, drew his gun, and yelled at

KEPHART to place his hands out his window. KEPHART complied but then pulled them back inside and gave a "fuck you" gesture from inside the car.

KEPHART eventually exited his car and faced the deputy. The deputy ordered him to get back into the car. He went half-way in but came back out. The deputy ordered him to turn around and to put his hands in the air. He complied. The deputy ordered him to walk backwards toward the deputy. He turned around with a "screw you gesture or why?" He also told the deputy that he had nothing on him. The deputy continued giving commands and ordered him to get on one knee. KEPHART turned around and again faced the deputy. He appeared to be questioning the command. The deputy again ordered KEPHART to face away. The deputy then approached him.

The deputy ordered KEPHART to put his hands behind his back. He did not comply. The deputy forced him to the ground. The deputy appeared to have difficulty handling him. KEPHART appeared to be about 400 pounds. The deputy looked at Witness 3 and nodded. Witness 3 interpreted this as a request for assistance. Witness 3 held KEPHART'S head to the ground and told him to calm down and cooperate. KEPHART rolled and knocked off both the deputy and Witness 3.

The deputy pulled out his taser but it appeared to be inoperable. KEPHART started to get off the ground. The deputy told him, "I'm going to taze you." The deputy tased him. KEPHART may have been on his knees at this point. The taser had no effect. Another bystander was saying, "Allen, calm down." The deputy told that person to step back. KEPHART did not calm down and continued to struggle. He said words to the effect of, "I didn't do it, I know who did." Witness 3 felt he was rambling.

Witness 3 continued to assist the deputy. Law enforcement backup had not come and it appeared the deputy wanted and needed help. Witness 3 heard sirens. He went to the street and flagged them down. The second deputy arrived and used his taser on KEPHART—to no effect. KEPHART was still out of control and rambling, "I didn't do it, I know who did, help me." The deputies ordered him to "stop resisting, stop resisting." Eventually, more deputies arrived and zip-ties were used to restrain KEPHART'S hands. The zip-ties were removed prior to CPR being administered.

INTERVIEW WITH WITNESS 4

Witness 4 was at Valero with her husband Witness 3. She heard sirens and saw KEPHART and the deputy drive into the parking lot at Valero. She was far away but it appeared KEPHART was not following the deputy's orders.

KEPHART exited his car and the deputy issued orders. KEPHART said something to the effect of, "I didn't do it, I didn't do it." The deputy continued to give commands but

KEPHART did not appear compliant. The deputy grabbed KEPHART and forced him to the ground. KEPHART appeared out of control.

At this time, Witness 3 went to assist the deputy. It appeared that KEPHART was reaching for the deputy's gun. The deputy attempted to use his taser but it appeared to not work. The deputy attempted to handcuff KEPHART but he would not allow the deputy to touch his hands. Several more deputies arrived. There were about eight deputies and about half of them used their tasers on KEPHART.

INTERVIEW WITH WITNESS 5

Witness 5 was at the Valero gas station. He saw KEPHART and the deputy drive into the parking lot. The deputy's overhead lights were on. The deputy exited his car with his gun drawn. Witness 5 entered the Valero store and looked out the window.

KEPHART exited his car and walked toward the deputy. KEPHART was a "big guy." The deputy approached KEPHART, grabbed him, and pulled him to the ground. Witness 5 could see under the patrol car that KEPHART was pushing up off the ground with his arms. Witness 5 went outside to assist. Another bystander was assisting the deputy. Witness 5 recognized KEPHART as "Allen," a former high school classmate.

KEPHART was on one knee when Witness 5 saw taser wires attached to his upper back. He was still pushing himself up. He was asking for help while Witness 5 was telling him to lay down. KEPHART was still posturing himself up when he was tased again. Witness 5 repeatedly told him to stay on the ground.

The deputy tried pulling back KEPHART'S arms. He was unsuccessful. KEPHART appeared too big and strong. The taser was used again. Witness 5 assisted the deputy in the hope of quickly ending the struggle. He held down KEPHART'S legs to prevent him from getting up. The deputy kept trying to pull KEPHART'S arms behind his back. Witness 5 told the deputy that his arms probably could not be pulled behind his back.

A second deputy arrived and engaged KEPHART. The deputies kept telling KEPHART to "stop resisting or I'll taze you." Both deputies used their tasers. Witness 5 was holding onto KEPHART'S feet. KEPHART kept struggling and kicking his feet.

Additional deputies arrived. One deputy grabbed KEPHART'S legs. Witness 5 backed off but continued to tell KEPHART to stay on the ground. He went back into the store. It appeared KEPHART stopped struggling and his hands were restrained. KEPHART was on his side when Witness 5 drove away.

INTERVIEW WITH WITNESS 6

Witness 6 was at the storage facility adjacent to Valero with her husband and two children. She heard a police siren. As she and her family drove to the exit gate, KEPHART parked on the other side of the gate and exited his car. A sheriff deputy was also present. The deputy appeared to be a third the size of KEPHART.

KEPHART acted crazy and would not listen to the deputy. He was "yelling and being a maniac." Eventually, the deputy physically engaged KEPHART and forced him to the ground. The deputy also appeared to have tased KEPHART. It did not seem to have any effect. KEPHART continued to flail his arms and move back and forth. His "legs were flying, he was moving his hands, he was freaking out." He made big movements during which he would roll over to get the people off him.

The deputy tried to control KEPHART'S arms. Two civilians held him while the deputy tried to apply handcuffs. They moved away when additional deputies arrived. The other deputies tried to hold down KEPHART but he kept "fighting, fighting, fighting, fighting." KEPHART continued to roll around and "he was being out of control."

Eventually, the deputies restrained KEPHART'S hands with zip-ties. His size may have hindered the use of conventional handcuffs. KEPHART then "just stopped," and the deputies began CPR.

Witness 6 had difficulty hearing anything because the car windows were up. It appeared that the initial deputy issued commands and gave KEPHART "significant time to relax and stop and to stay still" at the outset of the encounter.

INTERVIEW WITH WITNESS 7

Witness 7 was 20 feet away. KEPHART was face-down on the ground. A deputy was on his back and eventually used a taser on his back. Two more deputies arrived. They also used tasers on KEPHART'S back. KEPHART was ordered to "stop resisting!" He yelled, "please don't shoot me" or "please don't shock me" and he yelled for help.

The deputies used their tasers about 10 times. They did not punch, kick or use any other weapons on KEPHART. KEPHART'S size made it difficult for the deputies to control him. Once KEPHART stopped struggling, the deputies stopped using the taser.

The deputies restrained KEPHART using black zip-ties as cuffs. When KEPHART stopped moving, they checked for a pulse. Blood was coming from his nose. The zip-ties were immediately cut and CPR begun.

INTERVIEW WITH WITNESS 8

Witness 8 was getting his car washed at Valero. From 20 feet away, he saw KEPHART standing in front of a deputy. The deputy adamantly ordered KEPHART to get on the ground and to put his hands behind his back. KEPHART did not comply and walked towards the deputy. The deputy forced KEPHART to the ground, face-down, and got on his back. KEPHART appeared to use his legs to resist the deputy.

Witness 8 recognized Witness 5 at the scene. Witness 5 held onto KEPHART'S legs while the deputy tried to control his upper body. The deputy pulled out a taser but never appeared to fire it. Rather, the taser was applied to KEPHART in 3 to 5 different locations on his back and neck. The taser did not make any noise.

Witness 8 drove his car to the other side of the parking lot. He did not witness any part of the struggle while moving his car. When he looked again, several more deputies had arrived. There was blood on KEPHART'S face. One deputy appeared to have a Colt .45 handgun in his hand. The deputies began CPR. At no time did Witness 8 see any deputy hit, kick or strike KEPHART with a baton.

The deputy's tone was loud. The deputy yelled, "stop" and "quit." KEPHART "would not follow directions" and "would not cooperate, he just wouldn't stop."

INTERVIEW WITH WITNESS 9

Witness 9 was with her husband in a car. She parked on Highway 18 and had an unobstructed view of the incident. She saw two deputies struggling with KEPHART. KEPHART appeared at least 6 feet, 4 inches tall and 250 pounds.

One deputy was punched twice and was "getting beat up" by KEPHART. One deputy was struggling with KEPHART on the ground while the other tried a choke hold. One deputy tried to control KEPHART'S arm. KEPHART pushed away the deputy that was on his back.

The deputies were ordering KEPHART to "get on the ground." KEPHART did not comply. KEPHART appeared angry and made grunting "animal sounds." Witness 9 left before the struggle ended because the incident was very violent. She felt that KEPHART'S non-compliance was responsible for the incident.

INTERVIEW WITH WITNESS 10

Witness 10 and his wife Witness 9 watched the incident from their car on Highway 18. They were about 100 feet away. Witness 10 saw one deputy get up off the ground and shake his head. It appeared that he was punched. Witness 10 did not actually see a

punch, however. The second deputy forced KEPHART to the ground. KEPHART'S face was red. He fought with both deputies and kept trying to stand up. The deputies tried to keep KEPHART on the ground. Witness 9 drove away after about two minutes. He did not see any taser applications.

INTERVIEW WITH WITNESS 11

Witness 11 was at Valero washing her car. She heard sirens and saw KEPHART and the deputy drive into the parking lot. Being near the carwash made it difficult for her to hear any words being spoken.

The deputy exited the car with his gun drawn. The deputy eventually forced KEPHART to the ground. KEPHART was sitting or on his knees when the deputy tased him in the upper back. It appeared ineffective because KEPHART kept moving. A bystander was telling KEPHART to stay down. A local school teacher referred to KEPHART as "Allen" and told him to "just stay down." KEPHART was big and strong. He did not strike the deputy but was flailing, moving and rolling around.

A second deputy arrived. Both deputies were on KEPHART trying to get his hands behind his back. More law enforcement officers arrived and engaged KEPHART. Eventually, zip-ties were used to cuff KEPHART'S hands behind his back. KEPHART went limp. A deputy grabbed a first aid kit.

Witness 11 felt the force was excessive. KEPHART'S physical size and positioning possibly made it difficult for him to put his hands behind his back. She felt the struggle was too much activity for KEPHART, that he was unfit, unable to cooperate, and did not have the physical capacity to get up. At one point, she yelled, "Stop, you're going to give him a heart attack!"

Witness 11 video-taped a part of the incident. The video captured the deputies' efforts to apply medical aid but did not capture any part of the struggle. What it showed was consistent with the statements of witnesses.

INTERVIEW WITH WITNESS 12

Witness 12 parked her car and watched the incident. Two deputies were on top of KEPHART. One deputy applied a taser to his neck approximately 7 to 10 times. KEPHART was struggling and fighting while the deputies were trying to calm him down. KEPHART did not comply with the deputies' orders and repeatedly tried to stand up. Witness 12 went inside Valero and bought food (which was the reason she drove to Valero). When she came back out, KEPHART had been cuffed. The deputies then removed the cuffs and started CPR.

INTERVIEW WITH WITNESS 13

Witness 13 observed the struggle from 50 feet away. KEPHART was face-down on the ground. Two deputies were on top of him. A taser was applied four or five times. KEPHART was yelling, "Please help me!" He was not resisting but was panicking. More deputies arrived. A taser was applied two or three more times. KEPHART turned purple. Eventually, the deputies used zip-ties to bind his wrists. When the deputies noticed that KEPHART was non-responsive, they immediately cut the zip-ties and began CPR.

Witness 13 said that cars and people were obstructing his view. Also, the deputies were directing people to back away.

Witness 13 videotaped the incident on his cell phone. Any view of the deputies and KEPHART are obstructed by bystanders. The video offers no useful information.

INTERVIEWS WITH WITNESS 14 AND WITNESS 15

Witness 14 drove to Valero with his brother Witness 15. Witness 14 saw and heard a deputy yelling at KEPHART to get on the ground. KEPHART was facing away from the deputy as the deputy approached. KEPHART then turned around. The deputy threw KEPHART onto the ground and got on his back. Witness 14 and Witness 15 went inside Valero thinking the matter had concluded.

When they came back out, four or five more deputies had arrived. Two were engaged with KEPHART while the others stood nearby. KEPHART was tased at least once on the chest. Eventually, KEPHART was cuffed. When the deputies noticed that he was not moving, they cut the cuffs and began CPR. KEPHART was never kicked or struck with a baton. Witness 15 saw taser wires coming from KEPHART'S leg and chest.

INTERVIEW WITH WITNESS 16

Witness 16 worked the cash register at Valero. She saw KEPHART drive in and park his SUV. She saw the deputy use his shoulder to throw KEPHART onto the ground. The deputy got onto KEPHART'S back to stop any movement. The second deputy arrived and parked his car in Witness 16's line of vision. Other people also obstructed her view. She did not see much more of the ensuing struggle except KEPHART'S legs moving around on the ground.

INTERVIEW WITH WITNESS 17

Witness 17 was the clerk at Valero. She saw the deputy stopping the SUV. The patrol car's sirens were on. She went outside to watch. By then, KEPHART was on the

ground. The first deputy used a taser on KEPHART'S head and back. A second deputy arrived and used a taser on KEPHART'S back. Tasers were used about ten times.

The deputies were yelling "Stay still! Stay on the ground!" KEPHART'S legs continued to move. Witness 17 was unsure whether KEPHART was attempting to get up. The deputies had one of KEPHART'S hands behind his back but the other hand was under his stomach. Witness 17 yelled at the deputies to stop using the taser. She went back into the store because she did not want to watch any more of the struggle.

INTERVIEW WITH WITNESS 18

Witness 18 is Witness 8's daughter-in-law. She was eastbound on Highway 189 at Daley Canyon Road. A deputy was northbound on Daley Canyon Road. A car (later determined to be driven by KEPHART) was southbound on Daley Canyon Road. There is a stop sign in each direction. Several cars were stopped at the intersection taking their turns. The deputy and KEPHART were facing each other at the stop sign limit line. Witness 18 was the third car in her lane.

The deputy and KEPHART entered the intersection. KEPHART drove straight through while the deputy was turning left. They almost collided. KEPHART honked his horn but kept driving. The deputy turned around and activated his lights to initiate a stop.

Witness 18 was not focused on the cars entering the intersection since she was not the first car in her lane. She was unsure whose turn it was to enter the intersection.

TASER REPORTS

Taser activation reports were downloaded from the tasers used by DIAZ, LANE, GARDEA and BESHEER for all activity occurring on May 10, 2011.

DIAZ'S taser shows 8 activations. The first activation is a 6-second cycle at 15:17:24. The next seven are all 5-second cycles at 15:17:30, 15:17:38, 15:17:53, 15:18:00, 15:18:09, 15:18:20 and 15:18:26.

LANE'S taser shows 7 relevant activations. The first occurred at 06:25:03 hours, which is not relevant to the incident. The 7 relevant activations are at 15:06:06, 15:06:13, 15:06:19, 15:06:26, 15:06:40, 15:06:48 and 15:06:54. There was one 7-second cycle, one 6-second cycle, and five 5-second cycles.⁶

⁶ The taser report notes a time differential of 14 minutes and 3 seconds between the computer time and taser time. Adjusting the taser time by that differential reconciles the activation times closer to the actual time of the incident at Valero.

GARDEA'S taser shows 12 activations. The first was a 5-second activation at 15:17:59 hours. The other activations are 1-second cycles at 15:19:04, 15:22:49, 15:35:24, 15:37:16 . . . 18:28:01 and 19:17:41.⁷

BESHEER'S taser shows no activity.

AUDIO RECORDING OF TRAFFIC STOP

DIAZ had an Olympus digital recorder in his chest pocket. It recorded the entire encounter with KEPHART. The recorded length is 12 minutes and 23 seconds. A transcript is attached.

VIDEO RECORDINGS

Four videos were obtained. One was from Witness 11's cell phone. The 43-second video begins at the point life-saving measures are initiated. It captures no part of the struggle that occurred. What it shows is consistent with the statements of witnesses.

A second video was obtained from Witness 13. The 16-second video appears to begin after the struggle ended. The video was taken from a distance and the view is obstructed by people and cars. The video offers no relevant information.

A third video brought to law enforcement's attention was taken inside Union Bank in Blue Jay on May 6, 2011. Witness 19 stated that KEPHART was at Union Bank and did not appear well, had difficulty breathing, and leaned on the counter for support while walking. The video shows KEPHART at the teller counter only. He is pictured for about 5 minutes. It does not show him enter, exit or waiting in line. KEPHART does lean on the counter. As for any breathing difficulties, the video is not inconsistent with Witness 19's description but falls short of clearly corroborating it.

A fourth video is from a camera at nearby Arrowhead Self Storage. This fixed location camera recorded the incident from the moment KEPHART and DIAZ drove into the parking lot. There is no audio.

⁷ GARDEA'S activation report shows one 5-second activation and the remainders are 1-second activations that occur 1 minute to 4 hours afterwards. The entire struggle lasted less than 10 minutes. GARDEA stated that he used his taser once. A taser activation results in a minimum 5-second cycle. Accordingly, it is believed that GARDEA used the taser once on KEPHART at 15:17:59 hours with a 5-second cycle. The 1-second activations were not part of the contact with KEPHART.

Viewing the confrontation in the video was difficult due to: (1) the distance, (2) the video quality, and (3) KEPHART'S and DIAZ'S cars obstructing the view. Nonetheless, the following observations are noted (with references to the camera's internal clock):

- 15:05:20 – Both cars are seen driving into the parking lot. DIAZ's patrol car has its overhead lights flashing.
- 15:05:30 – DIAZ'S car door opens. Shortly thereafter, it appears KEPHART'S hand or hands are being held out his window.
- 15:05:45 – KEPHART'S door opens and he steps out. KEPHART is moving around for the next 35 seconds but his precise movements are difficult to determine.
- 15:06:25 – KEPHART appears to lower himself toward the ground but comes back up 4 seconds later. Shortly thereafter, DIAZ is seen approaching KEPHART.
- 15:07:00 – DIAZ and KEPHART are falling to the ground.

Observations are more difficult from this point forward because KEPHART'S car obstructs the camera's view.

- 15:07:26 – DIAZ stands up and moves away from KEPHART, possibly extending his hands toward KEPHART. KEPHART is partially visible – possibly on his knees. A few seconds later, the deputy re-engages KEPHART on the ground.
- 15:07:45 – There appears to be a bystander standing over KEPHART and DIAZ.
- 15:08:42 – A second patrol vehicle arrives (presumably LANE) and engages KEPHART. There still appears to be a bystander standing over the struggling individuals.
- 15:10:27 – The hood of what appears to be another patrol vehicle appears in the video. Presumably this is GARDEA or BESHEER. It appears that either or both engage KEPHART.
- 15:14:00 – It is difficult to determine when KEPHART is restrained. By this time, the deputies appear to be standing up and moving around. Presumably, KEPHART has been restrained.

Based on the video, the time lapse between DIAZ exiting his car and restraining KEPHART would be approximately 8-1/2 minutes. This is consistent with the dispatch call log which shows a lapse of 8-1/4 minutes between DIAZ calling in the stop at Valero and a deputy calling in that KEPHART had been restrained.

DISPATCH LOG

The dispatch log for the incident shows, in part:

- 15:15:02 → DIAZ calling in a traffic stop on Highway 18 and Daley Canyon Road
- 15:15:37 → DIAZ reporting that they are travelling 40 mph
- 15:15:48 → DIAZ reporting that they pulled into Valero
- 15:17:50 → DIAZ reporting a "415" with the subject

15:22:28 → DIAZ reporting that the subject was still "415"
15:24:05 → Report that the subject was in custody
15:24:22 → Request for medical aid
15:25:37 → Request to expedite medical aid

CIVIL LAWSUIT: INVITATION TO ATTORNEYS TO SUBMIT EVIDENCE

A civil lawsuit arising from KEPHART'S death is pending. The Plaintiffs' attorneys were invited to submit any information they wished this Office to consider in preparing this memorandum. They declined to provide anything at this time due to legalities relevant to their civil proceeding.

MEDICAL TREATMENT AND AUTOPSY PROTOCOL

Medical aid was called to the Valero gas station at approximately 1524 hours. KEPHART was taken to Mountains Community Hospital in Lake Arrowhead, California, and pronounced dead on May 10, 2011 at 1625 hours. His body was taken to the Riverside County Coroner's Office for autopsy. Dr. Mark Fajardo, Chief Forensic Pathologist for Riverside County, conducted the autopsy on May 13, 2011.

KEPHART was 43 years old, weighed 392 pounds and measured 75 inches in length.

Dr. Fajardo found external trauma at several locations. On the head, there was an abrasion on the right forehead, an abrasion over the bridge of the nose, two irregular abrasions on the left side of the neck, and an abrasion over the back of the head measuring 1-1/4 inches.

In the shoulder area, there were several paired punctate abrasions on the right upper shoulder region that were 1-1/2 inches apart. These punctate abrasions are consistent with taser applications.

On the upper extremities, there was an abrasion near the right wrist, a linear abrasion on the right forearm measuring 1/4 to 1/2 inches, two linear abrasions on the left forearm measuring 1 to 1-1/2 inches, and an abrasion over the left elbow.

On the lower extremities, there were two abrasions over the right kneecap and multiple linear abrasions on the right calf measuring 1/2 to 1 inches.

On the torso were four punctate abrasions on the left side measuring 1/4 to 1/2 inches.

On the back, there were multiple paired punctate abrasions consistent with taser applications on the right side, a pair of similar abrasions in the middle, and two taser darts attached to the right side with surrounding abrasion.

Dr. Fajardo found internal trauma as follows: Multiple rib fractures which he found most consistent with CPR applications. There was no other internal trauma.

An internal examination revealed that KEPHART'S heart was "markedly large" and the ventricular walls were thicker than normal.

Dr. Fajardo listed the cause of death as Hypertensive Cardiovascular Disease, specifically, cardiomegaly with concomitant left ventricular hypertrophy and minimal nephrosclerosis. Other significant contributors to death were KEPHART'S "obesity" and "physical duress" during the altercation with law enforcement.

KEPHART'S blood and urine were sent to Bio-Tox Laboratories for analysis. Test results did not reveal the presence of any alcohol, drugs or narcotics.

The San Bernardino County Coroner Review Board labeled KEPHART'S death a homicide. Any death caused at the hands of another is labeled a homicide. The label does not imply any judgment of criminality.

ALLEN KEPHART'S CRIMINAL HISTORY

None.

TASER

The deputies used an X26 Taser manufactured by Taser International. The taser is designed like a handgun. A removable cartridge is attached to the front. The cartridge contains two darts attached by wires to the cartridge. If the cartridge is removed, the taser can be used as a hand held stun gun.

The taser cartridge deploys two darts. Electricity flows between the two darts using the subject's body to "complete the circuit." The longer the "circuit," i.e, distance between the darts, the greater the effect.

A taser should be fired from a distance. This allows the darts to spread out and create a long "circuit" for optimum effect. When this is not possible, a "staple" and "drive stun" technique can be used. "Stapling" means to fire the darts at close range. The darts should attach to the target close together— which minimizes the effect. The deputy then "drive stuns" the subject by placing the taser gun and wires against a different part of the body. This effectively lengthens the "circuit" between darts and the taser. "Drive stun" has the alternative meaning of removing the cartridge altogether and using the taser as a hand held stun gun.

Each pull of the trigger gives a 5-second charge. It is longer only if the operator keeps the trigger depressed. It is shorter only if the officer manually turns off the taser. A taser charge causes involuntary muscle spasms resulting in the loss of volitional control of motor functions. If the cartridge is removed, the taser can be used as a handheld stun gun. Mostly, this inflicts pain and muscle spasms are dramatically reduced. Regardless of how the taser is used, there is no residual effect when the charge cycle ends. The subject immediately and completely regains composure.

RELEVANT LEGAL PRINCIPALES

Vehicle Code section 2800: Failure to Comply with Lawful Order of Uniformed Peace Officer

(a) It is unlawful to willfully fail or refuse to comply with a lawful order, signal, or direction of a peace officer . . . when that peace officer is in uniform and is performing duties pursuant to any of the provisions of this code . . .

Vehicle Code section 2800.1: Intention to Evade Peace Officer in Motor Vehicle

(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor punishable by imprisonment in a county jail for not more than one year if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform.

Vehicle Code section 22450: Stopping at Limit Line . . .

(a) The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection shall stop at a limit line, if marked, otherwise before entering the crosswalk on the near side of the intersection. [¶] If there is no limit line or crosswalk, the driver shall stop at the entrance to the intersecting roadway.

Vehicle Code section 21800: Yielding Right-of-Way

(a) The driver of a vehicle approaching an intersection shall yield the right-of-way to any vehicle which has entered the intersection from a different highway.

(b)(1) When two vehicles enter an intersection from different highways at the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on his or her immediate right, except that the driver of any vehicle on a terminating highway shall yield the right-of-way to any vehicle on the intersecting continuing highway. [¶] (2) For the purposes of this section, "terminating highway" means a highway which intersects, but does not continue beyond the intersection, with another highway which does continue beyond the intersection.

(c) When two vehicles enter an intersection from different highways at the same time and the intersection is controlled from all directions by stop signs, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on his or her immediate right.

(e) This section does not apply to any of the following: (3) When vehicles are approaching each other from opposite directions and the driver of one of the vehicles intends to make, or is making, a left turn.

Vehicle Code section 21801: Vehicles Turning Left or Completing U-Turn

(a) The driver of a vehicle intending to turn to the left . . . upon a highway . . . , shall yield the right-of-way to all vehicles approaching from the opposite direction which are close enough to constitute a hazard at any time during the turning movement, and shall continue to yield the right-of-way to the approaching vehicles until the left turn or U-turn can be made with reasonable safety.

(b) A driver having yielded as prescribed in subdivision (a), and having given a signal when and as required by this code, may turn left . . . , and the drivers of vehicles approaching the intersection . . . from the opposite direction shall yield the right-of-way to the turning vehicle.

Penal Code section 69: Resisting or Deterring Officer

Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed on such officer by law, or who knowingly resists, by the use-of-force or violence, such officer, in the performance of his duty is punishable [as a felony or misdemeanor].

Penal Code section 148(a)(1): Resisting or Obstructing a Peace Officer

Every person who willfully resists, delays, or obstructs a . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office . . . shall be punished [as a misdemeanor].

Penal Code section 834a: Duty to Refrain From Resisting Arrest

If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.

Penal Code section 835: Restraint Limited to Necessity

.... The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.

Penal Code section 835a: Use of Reasonable Force to Effect Arrest

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. [¶] A peace officer who makes or attempts to make

an arrest need not retreat or desist from his efforts by reason of resistance of threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

Penal Code section 836(a): Peace Officer's Authority to Arrest . . .

A peace officer may arrest a person in obedience to a warrant, or . . . without a warrant, may arrest a person whenever any of the following circumstances occur: (1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence. (2) The person arrested has committed a felony, although not in the officer's presence. (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

Probable Cause to Arrest

An arrest is reasonable under the Fourth Amendment when an officer has probable cause to believe the person arrested has committed a criminal offense. (*People v. Kraft* (2000) 23 Cal.4th 978, 1037; *People v. Moore* (1975) 51 Cal.App.3d 610, 616.) The probable cause standard applies to all offenses, from felonies to very minor criminal offenses punishable only by a fine. (*Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323, 340, 353; *People v. McKay* (2002) 27 Cal.4th 601, 605, 618.)

Probable cause to arrest exists when the facts and circumstances within the officers' knowledge would lead an officer of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime. (*Beck v. Ohio* (1964) 379 U.S. 89, 91; *People v. Kraft, supra*, 23 Cal.4th at p. 1037.)

Probable cause is a practical, nontechnical concept to be determined upon the facts and circumstances of each case. (*Maryland v. Pringle* (2003) 540 U.S. 366, 370-371.) It requires only the probability of criminal activity, not a *prima facie* showing. (*Illinois v. Gates* (1983) 462 U.S. 213, 235; *People v. Lewis* (1980) 109 Cal.App.3d 599, 608.)

Police Power to Detain Individual:

An officer has the right to temporarily detain a person when the officer has a reasonable suspicion of that person's involvement in criminal activity. Reasonable suspicion demands some minimum level of objective justification, but considerably less than is required for probable cause to arrest. (*United States v. Sokolow* (1989) 490 U.S. 1, 7; *Terry v. Ohio* (1968) 392 U.S. 1, 22.)

One function of a temporary detention is to resolve any ambiguity in the situation to find out whether the activity was in fact legal or illegal. (*People v. Souza* (1994) 9 Cal.4th 224, 242.) A detention is intended "to permit a speedy, focused investigation to

confirm or dispel [the] individualized suspicion of criminal activity' " justifying it. (*People v. Soun* (1995) 34 Cal.App.4th 1499, 1516.)

Police Use-of-Force to Detain or Arrest:

An officer attempting to enforce a detention or arrest may use an amount of force that is reasonably necessary. (*People v. Brown* (1985) 169 Cal.App.3d 159, 167.) The right to detain or arrest is meaningless unless officers may, when necessary, forcibly do so. (*People v. Johnson* (1991) 231 Cal.App.3d 1, 12.) Officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop." (*United States v. Hensley* (1985) 469 U.S. 221, 235; *People v. Soun* (1995) 34 Cal.App.4th 1499.)

Use-of-force is often criticized as being either: (1) unjustified or (2) excessive. Both charges are analyzed under the same reasonableness standard (*Graham v. Connor* (1989) 490 U.S. 386, 395):

The test of reasonableness in this context is an objective one, viewed from the vantage of a reasonable officer on the scene. It is also highly deferential to the police officer's need to protect himself and others: The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. [¶] [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

... Thus, under *Graham*, we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

(*Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1102-1103 [internal citations and quotations omitted.]

"[W]hen reasonably necessary under the circumstances" an officer may handcuff a suspect for a short period of time to conduct a patdown search (*People v. Osbourne* (2009)

175 Cal.App.4th 1052, 1062) or when a suspect is uncooperative or presents a reasonable possibility of danger. (*People v. Stier* (2008) 168 Cal.App.4th 21, 27-28.) An officer may strike a suspect when necessary to compel submission to an arrest. (*People v. Lopez* (1963) 222 Cal.App.2d 682, 685.) And, when reasonably necessary, an officer may detain at gunpoint, order out of cars, force to lie on the ground, and handcuff. (See, e.g., *People v. Celis* (2004) 33 Cal.4th 667, 674-676; *People v. Soun* (1995) 34 Cal.App.4th 1499; *People v. Johnson, supra*, 231 Cal.App.3d at p. 14; *In re Carlos M.* (1990) 220 Cal.App.3d 372, 385; *People v. Gorak* (1987) 196 Cal.App.3d 1032, 1038; *People v. Bowen* (1987) 195 Cal.App.3d 269, 274; *People v. Brown* (1985) 169 Cal.App.3d 159, 166-167; *People v. Craig* (1978) 86 Cal.App.3d 905, 912-913.)

Even if a detention or arrest is unjustified (thereby unlawful), every person has a duty to submit to the orders of a peace officer and may not resist unless excessive force is used or threatened. (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 332 ["Our conclusion is dictated by a pragmatic realization that the rule allowing forcible resistance leads to riots and violence by fostering a belief on the part of the detained person that he is the sole judge of whether the detention is or is not proper."])

CALCRIM 2670 (EXCERPTS): LAWFUL AND UNLAWFUL PERFORMANCE OF DUTY BY PEACE OFFICER

A peace officer is not lawfully performing his duties if he is unlawfully arresting or detaining someone or using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention.

A peace officer may legally detain someone if: [¶] 1. Specific facts known or apparent to the officer lead him to suspect that the person to be detained has been, is, or is about to be involved in activity relating to crime; AND 2. A reasonable officer who knew the same facts would have the same suspicion. [¶] Any other detention is unlawful. [¶] In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he detained the person.

A peace officer may legally arrest someone if he has probable cause to make the arrest. [¶] Any other arrest is unlawful. [¶] Probable cause exists when the facts known to the arresting officer at the time of the arrest would persuade someone of reasonable caution that the person to be arrested has committed a crime. [¶] In deciding whether the arrest was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he or she arrested the person.

In order for an officer to lawfully arrest someone without a warrant for a misdemeanor or infraction, the officer must have probable cause to believe that the person to be arrested committed a misdemeanor or infraction in the officer's presence.

In order for an officer to lawfully arrest someone for a felony or [a misdemeanor not requiring commission in officer's presence] without a warrant, the officer must have probable cause to believe the person to be arrested committed a felony or [a misdemeanor not requiring commission in officer's presence]. However, it is not required that the offense be committed in the officer's presence.

Special rules control the use of force. [¶] A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance, or in self-defense. [¶] If a person knows, or reasonably should know, that a peace officer is arresting or detaining him, the person must not use force or any weapon to resist an officer's use of reasonable force. However, you may not find the defendant guilty of resisting arrest if the arrest was unlawful, even if the defendant knew or reasonably should have known that the officer was arresting him.

If a peace officer uses unreasonable or excessive force while arresting or attempting to arrest or detaining or attempting to detain a person, that person may lawfully use reasonable force to defend himself.

A person being arrested uses reasonable force when he: (1) uses that degree of force that he actually believes is reasonably necessary to protect himself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his protection.

ANALYSIS

Allen John Kephart died on May 10, 2011. The cause of death was—in lay terms—a heart attack. He was “obese” and had a diseased heart brought on by hypertension. His pre-existing health conditions left him susceptible to heart attacks. The physical stress caused by the struggle with law enforcement was not the cause of death but it was—as stated by the pathologist—a “significant” contributing factor.

The grief from his death is felt by his family, friends and the whole community. And yet, assessing whether his death constitutes a criminal homicide is not controlled by that fact. The issue is whether the force used by the deputies was unreasonable. Based upon the evidence, this Office concludes that the actions of DIAZ, LANE, GARDEA and BESHEER were not unreasonable. Therefore, there is insufficient evidence to establish criminal liability on the part of these deputies.

THE DECISION TO DETAIN OR ARREST KEPHART WAS NOT UNREASONABLE.

The event that led to the confrontation between KEPHART and DIAZ occurred at a 3-way stop sign at the corner of Highway 189 and Daley Canyon Road. DIAZ states that KEPHART ran the stop sign and that he (DIAZ) honked his horn. Witness 18 states that

KEPHART stopped at the stop sign and that KEPHART honked his horn. Their statements conflict on these two points.

So, who honked? DIAZ is attesting to his own act in honking his horn. Witness 18 is attesting to a noise from one of two cars passing near each other. Fairly, her accuracy might be called into greater doubt on this point. Ultimately, the "who honked" issue distracts from the larger question – did KEPHART run the stop sign?

Ultimate guilt is determined in court. Guilt is determined in that venue. Witness testimony is offered under oath and tested in that venue. The burden of proof in court is proof beyond a reasonable doubt. A decision by an officer to initiate a traffic stop is entirely different. The authority to conduct a traffic stop (i.e., a detention) requires only a good faith, reasonable suspicion that a person violated the law.

Witness 18's statement that KEPHART stopped cannot be lightly disregarded. But there is not sufficient reason to disregard DIAZ'S statement to the contrary. Suffice it to say, "two people may witness the same event yet see or hear it differently." (CALCRIM 226.) Further, a person's perception can be inaccurate but honestly held. Witness 18's and DIAZ'S statements may very well be an example of inconsistent but honestly held perceptions. DIAZ honestly perceived KEPHART failed to stop. This provided reasonable suspicion to initiate a traffic stop.

An alternative analysis is to choose one version of the events. This Office finds DIAZ'S version more likely to be accurate. Witness 18 was not yet at her stop sign limit line. She did not need to and she – concededly – did not pay close attention to the actions of the other cars at the intersection. Indeed, she did not recall which car entered the intersection immediately before DIAZ and KEPHART. DIAZ, however, was at the limit line, was clearly paying attention to the actions of other cars, and clearly recalled which car entered the intersection before he and KEPHART – it was the white truck in front of KEPHART. These circumstances suggest that DIAZ'S recollection is more reliable. On that basis, DIAZ had reasonable suspicion that KEPHART ran a stop sign.

The traffic stop was also warranted because KEPHART failed to yield right of way. DIAZ stated that a white truck in front of KEPHART entered the intersection. KEPHART followed. Even assuming KEPHART stopped at the limit line before proceeding, it was not his turn to enter the intersection. Witness 18 stated that cars were waiting in all three directions. KEPHART was required to yield to another car. He did not do so. Failure to yield right of way is a violation of the law that provides a legal basis for a traffic stop.

The traffic stop was also warranted because KEPHART'S failure to immediately pull over established probable cause that KEPHART was evading. DIAZ was in uniform, driving a marked patrol car, and had turned on his lights and sirens. Two cars in front

of KEPHART pulled into turnouts while KEPHART continued onward. He stopped at the intersection of Daley Canyon Road and Highway 18 for a stop sign but then continued to drive. KEPHART passed another turnout on Highway 18 without stopping. At one point, he gestured with his hands. In all, KEPHART drove nearly a full mile before pulling over despite earlier opportunities to do so. Perhaps he had reasons for his actions. Those reasons will never be known but, more importantly, they were unknown to DIAZ. An officer can only judge what is known to him. Under these circumstances, DIAZ had probable cause to suspect that KEPHART was refusing to pull over.

What started as a detention for a stop sign violation or failure to yield escalated into probable cause to arrest for a misdemeanor evading. Each of these reasons provided sufficient legal basis to stop KEPHART.

DECISION TO DRAW FIREARM AND HANDCUFF KEPHART

DIAZ'S decision to draw his gun and to handcuff KEPHART was not unreasonable. First, the escalation of the offense to misdemeanor evading has significant legal effect. DIAZ may now effectuate an "arrest" and may employ force and restraint beyond what might be expected in a "detention," including the use of a gun and handcuffs, when contacting KEPHART.

Second, DIAZ'S actions were not unreasonable even if the contact is classified as a detention. A deputy faces unknown risks in every traffic stop. Concerns over officer safety rise when a suspect's actions deviate from the norm. The right to use reasonable force to insure one's safety rises proportionately.

In this instance, the initial purpose for stopping KEPHART was routine. And yet KEPHART'S conduct deviated from the routine. DIAZ was in full uniform, in a patrol car, and his lights and sirens were turned on. KEPHART continued driving for nearly a mile despite opportunities to stop. His hand gesture in the car demonstrated a disregard for the deputy's legal authority; or worse yet, outright defiance. DIAZ was not unreasonable in exercising greater caution in contacting KEPHART. DIAZ drew his gun to insure compliance with verbal orders. And, use of handcuffs would allow DIAZ to discharge his duties while insuring his own safety.

So, DIAZ exited his car with his gun drawn and ordered KEPHART to place his hands outside the window. He complied. DIAZ ordered KEPHART to use one hand to open his car door. He withdrew both hands inside. DIAZ ordered the hands outside the window and repeated the order to open the door and exit. KEPHART complied. KEPHART was ordered on multiple occasions to face away or turn around. KEPHART would turn 360 degrees and face DIAZ or turn away only to turn again to face DIAZ.

On two occasions—despite orders to face away—KEPHART took a step towards DIAZ. DIAZ interpreted these steps as possible acts of aggression. One civilian heard KEPHART say that he had nothing on him as he turned around. DIAZ found his words to be inaudible. DIAZ did not hear the words but DIAZ saw the actions.

DIAZ initially met KEPHART with a heightened concern for safety. KEPHART'S non-compliant and aggressive behavior escalated rather than dispelled these concerns. Under the circumstances confronting DIAZ, his decision to draw his gun and handcuff KEPHART was not unreasonable.

In the end, of course, the gun played no part in the ensuing struggle. It was the effort to handcuff KEPHART that contributed to his death.

FORCE WAS USED IN RESPONSE TO KEPHART'S RESISTANCE.

That struggle was witnessed by witnesses and recorded by video and audio. Though the witnesses offer differing personal opinions regarding the necessity of the force used, their factual account of the events are fairly uniform and corroborate DIAZ'S account.

KEPHART eventually complied with an order to face away. DIAZ put himself into a vulnerable position by approaching KEPHART. His gun was put away and he was within KEPHART'S reach. KEPHART'S size was always a concern. At this most vulnerable moment KEPHART, yet again, tried turning to face DIAZ.

DIAZ was alarmed. He felt an urgent need to gain control of KEPHART. KEPHART had shown a pattern of non-compliant behavior. Verbal orders even at gunpoint were ignored. Direct application of physical force at this moment was not unreasonable.

DIAZ first applied a control hold which was unsuccessful. Only then did DIAZ grab KEPHART and throw him to the ground. DIAZ repeatedly ordered KEPHART to stop resisting, to stay on the ground, and to give up his hands. At least two witnesses went to assist DIAZ in controlling KEPHART. DIAZ was clearly having difficulty controlling him. LANE was the first backup to arrive. GARDEA and BESHEER came later. Bystanders were yelling at KEPHART to stay on the ground. BESHEER applied a head displacement technique without success. He then applied pressure to pressure points.

BESHEER struck KEPHART in the leg with his hand one time to stop his kicking. These are the same legs that Witness 3 and Witness 5 unsuccessfully tried to control. The witnesses uniformly stated that the deputies simply tried to keep KEPHART on the ground and to pull his hands behind his back. It eventually took four deputies to restrain KEPHART. DIAZ later commented that his arms began to cramp and seize up.

KEPHART'S resistance is described by several civilians. KEPHART flailed and kicked his legs. He tried to get up off the ground despite orders otherwise. He fought back when deputies tried to pull his hands behind his back. KEPHART kept his hands underneath himself. When the deputies pulled it out, KEPHART was strong enough to pull it back underneath. Per Witness 3, KEPHART once rolled and knocked away DIAZ and Witness 3. Witness 9 felt DIAZ was "getting beat up" by KEPHART. Witness 8 stated that KEPHART "would not follow directions" and "would not cooperate." Furthermore, KEPHART appeared to reach for DIAZ'S waist. This is corroborated by Witness 4. The danger in this is self-evident.

The force used by the deputies was proportional to the resistance KEPHART displayed. Significantly, they did not use any weapons during the struggle except the taser.

THE USE OF THE TASER

KEPHART was possibly tased 16 times: eight by DIAZ, seven by LANE and once by GARDEA. Employing the taser to control KEPHART was a reasonable response to KEPHART'S resistance. The extent of its use warrants more consideration.

DIAZ used his taser. LANE came afterwards and used his taser. GARDEA came later and used his taser. Each deputy's use of his taser must be judged independent of the others. GARDEA, for instance, would not have known the extent of the use by LANE or DIAZ. Each deputy's action is judged based upon information known to him.

DIAZ reached for his taser after the struggle had begun because he was unable to gain control of KEPHART. The taser seemed inoperable. DIAZ put away the taser and engaged KEPHART again. KEPHART continued to resist and DIAZ could not restrain him. DIAZ tried the taser again using the "staple" and "drive stun" method. DIAZ heard the cycling noise but it had no effect on KEPHART. DIAZ was unsure if it was ineffective or inoperable. He tossed the taser aside. All eight taser cycles occurred within a 62 second time frame.

Finding it impossible to restrain KEPHART due to his size and strength, DIAZ understandably sought to use the taser. DIAZ was unsure whether the taser was even operable. KEPHART'S lack of response caused DIAZ to further question its operability. There is nothing inherently wrong with repeated cycling of a taser. This is particularly true when unsure of its operability. Noticeably, DIAZ did not continue to hold the trigger and send a continuous stream of electricity through KEPHART. Instead, each trigger pull resulted in short cycles—the first was 6 seconds and the rest were the minimum 5-second cycle. What is significant is the short length of time that DIAZ used the taser before stopping. After 62 seconds of short but repeated cycles, DIAZ ceased all use of the taser when its uselessness became evident.

LANE'S taser usage is similar. LANE arrived to find DIAZ struggling with KEPHART. His arrival did not change the dynamics of the struggle—KEPHART successfully resisted the efforts of DIAZ, LANE and two civilians to restrain him. LANE used his taser. Like DIAZ, LANE was initially uncertain whether it was working because KEPHART seemed unaffected. LANE used the taser seven times during a short 48-second time frame with short cycles—a 7-second cycle, a 6-second cycle, and five minimum 5-second cycles. When he found the taser to be ineffective, he discarded it.

The extent of the taser use by DIAZ and LANE was not unreasonable. Their use may have overlapped. Nonetheless, the tasers were used for a short time frame and its use was discarded when it proved ineffective. The cycles were kept short, offering a chance to avoid further use if KEPHART stopped resisting.

Furthermore, choosing to use the taser avoided the use of greater force. DIAZ and LANE, even with the help of two civilians, could not control and restrain KEPHART. Escalation of force to some degree was not inappropriate. The options were to strike KEPHART with hands and fist, to strike KEPHART with impact weapons (such as an asp), or to shoot KEPHART with a gun. These options carried a high risk of inflicting serious injury or death. The taser, however, is designed to incapacitate rather than injure the subject. The initial decision to use a taser, and then to continue its use, avoided the need to employ greater force. Their decisions in that regard were not unreasonable.

GARDEA also used a taser. He and BESHEER arrived and engaged in the struggle. Experiencing difficulty controlling KEPHART, GARDEA applied his taser—once. Though his taser application was the 16th application, GARDEA'S actions must be judged independent of DIAZ and LANE. Significantly, he stopped further use when informed by LANE that prior taser applications proved ineffective. His single application of the taser was not unreasonable.

No doubt that the use of a taser and, in particular, the extent of its use stirs controversy if death results. Nonetheless, the taser was a means to avoid the use of greater force. Under these circumstances, the use of the tasers was not unreasonable.

EVALUATION OF KEPHART'S INJURIES

The injuries suffered by KEPHART can reveal in an objective way the force applied against him. An autopsy was conducted on KEPHART'S body by the Riverside County Coroner's Office. The pathologist's findings confirm the conclusion that the deputies' use of force was not unreasonable.

Dr. Fajardo found numerous abrasions which were consistent with the face-down struggle KEPHART endured and abrasions consistent with numerous taser uses.

Significantly, there was no internal trauma attributable to the deputies' use of force. The broken ribs were attributed to the life-saving measures implemented after the struggle. KEPHART'S injuries make clear that the deputies used only the force necessary to overcome KEPHART'S resistance.

Various witnesses have described the struggle as violent and found it difficult to watch. Significant use of force is violent and disturbing by its very nature. When meeting resistance, however, an officer must not shrink from his responsibilities but must engage it despite the possibility of violence.

Witness 11 for one felt the force was excessive. She yelled, "Stop, you're going to give him a heart attack!" That is what happened. Under the law, however, the deputies were obligated to discharge their duties even in the face of resistance and KEPHART was the party required to stop and submit. He did not do so.

Other witnesses felt KEPHART was panicking rather than resisting; and that he was asking for help. But the accounts of numerous other witnesses describe active resistance. In theory, panic may induce resistance. Regardless of the underlying reason, the deputies were met with active resistance. They may react accordingly.

Some may criticize the length of the struggle. The entire struggle lasted less than seven minutes. LANE was involved in the last five minutes. GARDEA and BESHEER were involved less. The length of the struggle was not their choice. KEPHART resisted DIAZ, and then DIAZ and the two civilians, and then DIAZ, LANE, and the civilians. Only after GARDEA and BESHEER arrived with flex cuffs was KEPHART eventually restrained. It was KEPHART'S resistance that dictated the length of the struggle. When his resistance ended, so did the use of force.

It is important to mention that the actions of LANE, GARDEA and BESHEER are judged differently than DIAZ. DIAZ initiated the stop and the struggle with KEPHART. LANE, GARDEA and BESHEER were not involved in those decisions. They reacted to what they heard and saw. LANE heard about the traffic stop, failure to yield, and the "415." GARDEA and BESHEER heard about the "415." When they arrived, they saw DIAZ engaged in a struggle with a resistant suspect. Therefore, their actions are judged independently based solely on the facts and circumstances as known to them.

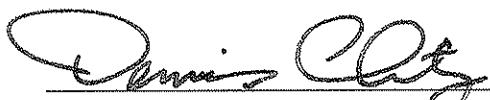
CONCLUSION

DIAZ, LANE, GARDEA and BESHEER are obligated to enforce the laws of the State. It was KEPHART'S obligation to submit to their legal authority, to follow all reasonable commands, and to cease any active resistance. KEPHART failed to meet these obligations. Force was employed. However, no weapons were used other than tasers.

KEPHART suffered no internal injuries that were attributed to the struggle. His injuries consisted of superficial, external abrasions. It was the unfortunate combination of KEPHART'S pre-existing health condition and the duress of the struggle that triggered a heart attack.

All use of force carries some risk. Nonetheless, officers must use force when confronted with defiance or resistance. KEPHART was defiant and resistant. The force used by the deputies was limited to overcoming that resistance.

Criminal liability exists if members of law enforcement use unreasonable force, either in its initiation or its application. Applying that standard, this Office concludes that there is insufficient evidence to establish criminal liability on the part of any involved-member of the Sheriff Department and decline to file criminal charges.



Dennis Christy
Assistant District Attorney

1-20-12

Date


Clark Hansen III
Chief Deputy District Attorney
Central Division

1/20/2012

Date


William Lee
Deputy District Attorney

1/20/12

Date

DR
H#

By: RDM

1 Diaz Belt Recording

2 DIAZ: Five Robert thirty-two traffic.

3 DISPATCH: Five Robert thirty-two?

4 DIAZ: It's gonna be on Highway eighteen and Daley Canyon on a five Paul
5 Mary zero one seven

6 DISPATCH: Robert thirty-two it's gonna be clear for an o four Honda, last of Kephart
7 out of Lake Arrowhead (inaudible – car sirens)

8 DIAZ: And fail to yield Highway eighteen

9 DISPATCH: Which direction?

10 DIAZ: It's Highway eighteen towards Crestline

12 DISPATCH: Copy failure to yield towards Crestline. Five Sam copy?

13 LANE: That's affirm. I'm enroute.

15 DIAZ: And we're approaching Bear Spring Road.

16 DISPATCH: Copy approaching Bear Spring.

17 DIAZ: Traffic speeds of uh forty miles per hour.

18 DISPATCH: Forty miles per hour. Please clear this channel for five Robert thirty-two
19 Code thirty-three.

20 DIAZ: And the vehicle is pulled into the Valero gas station on Highway
21 eighteen and uh --

22 DISPATCH: Copy pulled into the Valero Highway eighteen and what's the cross?

23 DIAZ: It's gonna be Pine --

24 DISPATCH: Copy.

26 DIAZ: and vehicle's taking a parking spot --

27 DISPATCH: Copy and a parking spot.

DR
H#

By: RDM

1 DIAZ: Hey... Put your hands out of the window. Both hands. Both hands out
2 of the window. With your left hand open up the door. Open the door.
3 Put both hands back out.

4 KEPHART: What did you say?

5 DIAZ: Put both hands up in the air.

6 KEPHART: Okay I'm just going here to the car wash.

7 DIAZ: Okay. Put your both hands in the air.

8 KEPHART: (inaudible)

9 DIAZ: Turn around. Turn around. Turn around.

10 KEPHART: Okay (inaudible)

11 DIAZ: Now walk --

12 KEPHART: (inaudible) Okay I just didn't understand you.

13 DIAZ: Turn around.

14 KEPHART: I made a mistake (inaudible).- - just an accident.

15 DIAZ: Turn around, Turn around.

16 KEPHART: Okay.

17 DIAZ: Turn around. Put your hands behind your back. Stop.

18 KEPHART: Okay.

19 DIAZ: Turn around. Do not face me.

20 KEPHART: Okay.

21 DIAZ: Do not face me.

22 KEPHART: Okay.

23 DIAZ: Turn around. Face that way.

DR
H#

By: RDM

1 KEPHART: Okay. All right.
2
3 DIAZ: Now put your hands behind your back.
4 KEPHART: I, I --
5
6 DIAZ: Go to your knees.
7
8 KEPHART: Should I --
9
10 DIAZ: Go to your knees. What's wrong with you?
11 KEPHART: Nothing. I just you know I just misjudged. I guess you know and --
12 DIAZ: Okay turn around.
13 KEPHART: Okay.
14 DIAZ: Put your hands behind your back .
15 KEPHART: Okay.
16 DIAZ: Do not move dude. Listen to me.
17 KEPHART: Okay.
18 DIAZ: Listen to my voice.
19 KEPHART: I didn't --
20 DIAZ: Turn around.
21 KEPHART: Turn around. Okay turn around.
22
23 DIAZ: Put your hands behind your back. Stop.
24 KEPHART: (inaudible) You know.
25 DIAZ: Face that way.
26 KEPHART: Okay. (inaudible)

DR
H#

By: RDM

1 DIAZ: (sound of handcuffs) What's wrong with you?
2 KEPHART: Wait a second (inaudible)
3 DIAZ: Hey. Get on the ground.
4 KEPHART: No. No. (inaudible)
5 DIAZ: Sir. Get on the ground.
7 UNK MALE: Sir. Sir. Sir (inaudible) Hold it.
8 KEPHART: Oh God.
9 DIAZ: Get on the ground.
11 KEPHART: I'm on the ground.
12 DIAZ: Get on the ground.
13 KEPHART: I'm on the ground.
15 DIAZ: Get on the ground.
16 KEPHART: I'm on the ground as much as possibly. Sir, help me.
17 DIAZ: 415 with subject. Get on the ground.
18 KEPHART: Fuck.
20 UNK MALE: Put your handcuffs on (inaudible)
21 UNK MALE: Get on your belly --
22 UNK MALE:: Wait.
23 UNK MALE: What're you guys doing, man?
25 DIAZ: You're gonna get tased --
26 KEPHART: (inaudible) Help me.
27 DIAZ: Get back.

DR
H#

By: RDM

1 KEPHART: Help me please.
2
3 DIAZ: Get on the ground or you'll get tasered. The -- When it works.
4
5 KEPHART: (inaudible)
6
7 DIAZ: Get on the ground.
8
9 UNK MALE: There you go. You got it.
10
11 UNK MALE: Sir --
12
13 (Sound of TASER activation)
14 KEPHART: Oh, fuck. (sound of TASER activation) God damn it!
15
16 DIAZ: Get on the ground!
17
18 KEPHART: Fuck, help.
19
20 DIAZ: Get on the ground.
21
22 KEPHART: It's bad.
23
24 DIAZ: Get on the ground.
25
26 UNK MALE: Allen, get on the ground.
27
28 DIAZ: Get on the ground.
29
30 UNK MALE: Allen get on the ground.
31
32 KEPHART: I'm on the ground.
33
34 DIAZ: Stay down.
35
36 UNK MALE: Lay down.
37
38 DIAZ: I said stay down.
39
40 KEPHART: All right.

DR
H#

By: RDM

1 UNK MALE: Allen, lay down.
2 KEPHART: (inaudible)
3 UNK MALE: Allen --
4 KEPHART: Help me.
5 UNK MALE: Allen, Allen lay down.
6 KEPHART: Ugh.
7 UNK MALE: Allen --
8 DIAZ: Get on the ground.
9 (TASER activation sound heard)
10 UNK MALE: Allen don't --
11 KEPHART: (inaudible)
12 DIAZ: Stay on the ground.
13 UNK MALE: Down.
14 DIAZ: Just stop moving.
15 KEPHART: Help me up.
16 DIAZ: Stop resisting.
17 KEPHART: Oh.
18 DIAZ: Stop moving.
19 KEPHART: Augh.
20 (VOICES YELLING)
21 UNK MALE: Sir, sir --
22 UNK MALE: What the fuck?

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By: RDM

1 KEPHART: I'm not a menace --
2
3 DIAZ: Get on the ground. Listen to me. Listen to me. Turn around.
4
5 KEPHART: I'm not a menace. Please sir.
6
7 DIAZ: I'm gonna shoot you again.
8
9 (TASER activation heard)
10
11 KEPHART: God damn.
12
13 UNK MALE: Allen --
14
15 KEPHART: (grunting, inaudible) Help me, help me, help --
16
17 UNK MALE: No, lay down on the ground.
18
19 DIAZ: Get on the ground.
20
21 KEPHART: All right.
22
23 UNK MALE: Lay down on the ground. Stay there, Allen.
24
25 (TASER activation heard)
26
27 KEPHART: Don't shoot me please.
28
29 DIAZ: Get on the ground.
30
31 KEPHART: Oh damn (inaudible)
32
33 (TASER activation heard)
34
35 DIAZ: Get on the ground.
36
37 KEPHART: Don't do that.
38
39 (Sirens)
40
41 DIAZ: Get on the ground.

DR
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By: RDM

1 UNK MALE: Roll over.
2 LANE: Stop resisting! Stop resisting! Lay down. Lay down!
3 KEPHART: All right.
4 LANE: Lay down on your stomach now.
5 KEPHART: Sir --
7 LANE: Lay down. Lay down!
8 KEPHART: Sir, sir, help me --
9 LANE: I'm gonna tase you if you don't relax.
11 KEPHART: Alright.
12 LANE: Stop resisting right now! Lay down on your stomach, now.
13 KEPHART: Ow. Help me. (unintelligible yelling)
15 DIAZ: Stop resisting!
16 KEPHART: Sir --
17 DIAZ: Get down on the ground.
18 KEPHART: Sir you're being (inaudible) Son of a bitch!
19 (TASER activation heard)
21 LANE: Stop resisting. (inaudible) Give me your hand. Get that one and I'll hold it here. Stop resisting! Stop resisting!
23 KEPHART: Son of a bitch!
24 LANE: Put him on his stomach guys, on his stomach.
25 KEPHART: (growling)
26 LANE: Stop resisting!
27
28

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By: RDM

1 DIAZ: Stay on the ground dude.

2 LANE: Stop resisting! Stop resisting! Put your hands behind your back now!
3 Put it behind your back now!

4 KEPHART: Okay, okay

5 LANE: Put them behind your back now. (inaudible) Put your hands behind your
6 back now!

7 GARDEA: Has he been tased?

8 DIAZ: Yeah we tased him.

9 LANE: Put them behind your back --

10 BESHEER: Stop moving!

11 (Inaudible people talking, sirens going, grunting)

12 DIAZ: Stop resisting!

13 UNK MALE: (inaudible)

14 KEPHART: Don't hit me (inaudible)

15 BESHEER: Cuff him.

16 LANE: I can't --

17 DIAZ: Stop resisting!

18 BESHEER: Hit him again with the taser. Hit him again. Hit him again. Hit him.

19 (TASER activation)

20 KEPHART: (inaudible)

21 LANE: It's ineffective. It's not gonna fit

22 BESHEER: All right

23 LANE: Anybody got flex cuffs?

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By: RDM

1 UNK MALE: (inaudible)
2
3 BESHEER: Yeah.
4 LANE: Flex cuffs?
5 UNK MALE: (inaudible)
6
7 BESEER: They're in my, big bag in the back.
8 LANE: Five Sam one still four fifteen.
9 LANE: Stop resisting.
10 LANE: Do you think they hear me?
11 (inaudible radio traffic)
12
13 BESHEER: I don't know. Maybe not.
14 DIAZ: He's still breathing.
15 UNK MALE: (inaudible) to him.
16 UNK MALE: Nah, I don't got anything.
17 LANE: Five Same one, roll med aid.
18
19 (Inaudible talking – siren heard)
20 BESHEER: Tell him it's in my bag in the back on the side.
21 DIAZ: Damn dude.
22
23 BESHEER: What happened dude? We were on the other channels, dude, we didn't
24 hear what was going on.
25 DIAZ: Did you hear fail to yield?
26 BESHEER: Nah, we were on the other channel 'cause they called thirty three on
27 ours.
28

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By: RDM

1 DIAZ: Dude I tased him I don't know how many times.
2 LANE: Let's get him on his side if we can. He's not really resisting.
3 UNK MALE: (inaudible)
4 DIAZ: Nah. I don't know. He's really worn down.
5 GARDEA: Yeah he's not really resisting.
6 LANE: He's limp right now but - - (sound of flex cuffs)
7 DIAZ: What's up Trace?
8 RADIO TRAFFIC: Five MET two, or five MET one, we're rolling ninety-seven.
9 UNK MALE: Aww shoot.
10 DISPATCH: Five MET one, ninety-seven
11 BESHEER: We can do one more if you want.
12 GARDEA: No that's fine. (inaudible) We were on TAC two.
13 LANE: He's strong. We need to get him on his side.
14 DIAZ: Dude I must have tased this guy (inaudible) times.
15 LANE: (inaudible) we have him in custody
16 DISPATCH: Okay. Subject in custody.
17 GARDEA: Can we roll med-aid?
18 RIOS: Freakin' I already called.
19 BESHEER: (inaudible)
20 LANE: We just need to hold him right here.
21 KLINKHART: (inaudible) have med-aid roll, code.
22 DISPATCH: That's affirm.
23
24
25
26
27
28

DR
H#

By: RDM

1 DIAZ: You get your taser yet Sarge?
2 LANE: Uh it's on the ground.
3 NEWSOM: Is he breathing?
4 BESHEER: I don't think so. I'm not getting one right now.
5 DIAZ: Hey did you get a taser gun from the ground?
7 GARDEA: Yeah I threw it, I took out the battery and I threw it in the car.
8 (Sirens, inaudible)
9
10 UNK MALE: (inaudible)
11 UNK MALE: I have no idea. I was just standing over here and I seen that he could
12 use some help. (equipment sounds)
13 BESHEER: Fire's on their way. They're code.
14 UNK MALE: Big guy --
15 GARDEA: Do you need, uh, any equipment?
16 KLINKHART: Should I put out he's not breathing so they will step it up Sarge?
17 BESHEER: Bring me the green bag out the back --
19 LANE: Let's get him on his back.
20 KLINKHART: Do you want me to put out he's not -- ?
21 DIAZ: He's breathing. I can see his belly's moving.
22 KLINKHART: He's not getting a pulse.
24 BESHEER: You gonna cut them?
25 LANE: Yep.
26 UNK MALE: We always cut 'em --
27
28

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H#

By: RDM

1 LANE: Let's get him on his back.
2 KLINKHART: You want me to put out not breathing, Bryan?
3 BESHEER: Yep.
4 LANE: Yep, let's go. (inaudible)
5 UNK MALE: Hey, don't leave alright?
6 UNK MALE: I wasn't leaving.
8 UNK MALE: Okay.
9 KLINKHART: Who's got a CPR mask?
10 KLINKHART: CPR mask - Who's got one close?
12 KLINKHART: Get one.
13 BESHEER: Got it, got it, got it.
14 UNK MALE: What's his name anyone?
15 DIAZ: Anybody need a towel?
16 LANE: Anyone, his name?
18 DIAZ: Don't know the guy's name.
19 LANE: Starting compressions (inaudible)
20 UNK MALE: Chest moving at all?
22 COTTRELL: What can we do for you Sarge? (inaudible)
23 RIOS: No. No movement.
24 BESHEER: No pulse. (inaudible)
25 RIOS: Starting compressions.
26 GARDEA: (inaudible) anything.
27
28

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H#

By: RDM

1 RIOS: One, two, three.
2 UNK MALE: (inaudible) CPR in progress.
3 DISPATCH: Copy, CPR in progress.
4
5 LANE: Were you guys down at court or what?
6 RIOS: Yes
7
8
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